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No. 93-1562

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MR. SPROUT, INC., TRAY WRAP, INCORPORATED, COUNTRY WIDE PRODUCE, INCORPORATED, G&T TERMINAL PACKAGING CO., INC.,

Petitioners,

v.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION,

Respondents,

and

CONSOLIDATED RAIL CORPORATION, and ATCHISON, TOPEKA, and SANTA FE RAILWAY COMPANY,

Intervenors.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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SUPREME COURT OF THE UNITED STATES

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MR. SPROUT, INC., ET AL., PETITIONERS,

V.

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On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Second Circuit

REPLY BRIEF FOR PETITIONERS

INTRODUCTION

Respondents have not persuasively challenged the important need for this Court to determine whether the Interstate Commerce Commission ("ICC") is improperly permitting deregulated rail carriers to impose illegal discriminatory rate charges against shippers and receivers who file legitimate loss and damage claims. Instead, the Respondents have misapplied a ruling of the Third Circuit from a prior stage of this litigation; have espoused the same flawed burden of proof employed by the ICC and the Court of Appeals; have characterized as non-essential the demonstrably erroneous construction of the "different routes" statutory provision; and have seriously

mischaracterized Petitioners' arguments.

ARGUMENT

THE RESPONDENTS' ARGUMENTS AGAINST FURTHER REVIEW ARE UNPERSUASIVE

I. Conrail Cannot Recoup the Costs of Litigating Claims That Have Been Unreasonably Denied

Respondents do not directly address Petitioners well founded argument that the Court of Appeals, having acknowledged the evidence of Conrail's participation in improper freight inspection practices,[1] should not have sanctioned Conrail's purportedly cost-based justification for the surcharge. Pet.II.C. Instead, Respondents contend that Petitioners' argument is foreclosed by G. & T. Terminal Packaging Corp. v. Consolidated Rail Corp., 830 F.2d 1230 (3d Cir. 1987), cert. denied, 485 U.S. 988 (1988). RB 10. Like the Second Circuit, Pet. B22, Respondents have misapplied this decision, which was rendered at an earlier stage of this litigation.

The Respondents have quoted from the portion of the Third Circuit opinion which rejected the Petitioners contention that the surcharge violated 49 U.S.C. § 11707, which prohibits rail carriers from relieving themselves of

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[1] Indeed, the Second Circuit reversed the ICC's attempt to disclaim authority over these freight inspection practices, and remanded this matter to the ICC for further proceedings under its "unreasonable practices" jurisdiction. Pet. B23-30.

the cost of loss and damage claims. What the Third Circuit did not address -- and, indeed, left for subsequent determination by the ICC -- was Petitioners' claim that the surcharge constitutes unlawful rate discrimination under 49 U.S.C. § 10741. The Second Circuit was the first court to address this novel and important issue relating to rate discrimination.

Moreover, the Third Circuit addressed a much different record from that which was subsequently developed before the ICC. It was after the litigation in the Third Circuit that the ICC, as part of the administrative revocation proceedings, permitted the Petitioners (over Conrail's objection) to depose seventeen witnesses on the issue whether Conrail was endorsing false freight inspection reports. Unlike the Third Circuit, the Court of Appeals for the Second Circuit had before it substantial evidence of false inspection reporting -- evidence that thoroughly undermines the notion that Conrail suffered legitimate freight claims costs which justify the surcharge.

Finally, with regard to the cost-based justification for the surcharge, it bears emphasizing that neither the ICC nor the Court of Appeals concluded that the surcharge was closely equivalent to Conrail's costs in defending loss and damage claims instituted by the Petitioners.[2] To the contrary, the record unequivocally

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[2] After an exhaustive review of the record, the ICC Administrative Law Judge concluded: "Conrail's surcharge is based on inflated and exaggerated figures purporting to show the cost of processing claims filed by petitioners.

demonstrates that the surcharge was not a measure to recoup legitimate costs but an effort to intimidate the Petitioners from filing claims. Pet. 7-8. As the ICC Administrative Law Judge found, Conrail's motivation was demonstrated by the timing of the surcharge as well as the immediate and sharp reduction in loss and damage claims filed by all Hunts Point receivers following the imposition of the surcharge. Pet. D84[3] This Court should not permit the ICC to shirk its duty to remedy Conrail's discriminatory pratices.

Past history establishes that most of petitioners' claims are validated by payment." Pet. D112.

[3] A current telegram which Petitioners have recently obtained documents this potentially expansive problem. Styled an "Addendum to Union Pacific Fresh Fruit and Vegetable s Rates," the telegram provides:

> Effective June 1, 1994 all shipments of perishable commodities originating on the Union Pacific and destined to Morris Okun, Inc. are subject to a surcharge of $500 per car. This surcharge will apply until further notice. The surcharge will be due from the payer of the freight charges, whether it is the shipper, receiver, or broker.

Like Petitioner G&T Terminal Packaging Corp., Morris Okun, Inc. is located in the Hunts Point section of Bronx, New York.

II. Like the Court of Appeals, the Respondents Employ the Wrong Standard of Proof

The Respondents endorse "the Commission's conclusion that [the Petitioners] failed to establish an essential element of their prima facie case of discrimination because they did not prove that their business was significantly impaired following" the surcharge. RB 8. Thus, by their own characterization in their opposition brief, the Respondents acknowledge the ICC's conclusion that Petitioners had the burden to prove actual competitive injury resulting from the surcharge. The rather fundamental flaw in Respondent's argument is that the proof demanded by the ICC has never been demanded in rate discrimination cases.

It is well settled that a complainant need only show the potential for competitive injury to support a claim of unlawful rate discrimination. State of New York v. United States, 568 F.2d 887, 898 (2d Cir. 1977); Harborlite Corp. v. ICC, 613 F.2d 1088, 1098 (D.C. Cir. 1979). The fact that the Second Circuit permitted the ICC to abandon this settled standard of proof cannot be dismissed with the Respondents misleading argument that "Petitioners' challenge rests on nothing more than a disagreement with the Commission's assessment of the evidentiary record." RB 8.

With the proper evidentiary burned in mind, the Commission's assessment of the proof on this issue is clearly erroneous. As the ICC's Administrative Law Judge found, the potential for injury was demonstrated by

the precipitous drop in Petitioners' potato shipments.[4] Moreover, the ICC acknowledged that the Petitioners presented witnesses who testified that their prices rose to non-competitive levels after the surcharge, and that Anthony Spinale (the principal of G&T Terminal Packaging) attributed these price increases to Conrail's surcharge. Pet. C24. Finally, the surcharge indisputably increased the Petitioners' rail rates by 10%, and (by the ICC's own calculation) the surcharge devoured "one-fourth petitioners' markup in potato prices." Pet. C26. These factors clearly demonstrated the potential for competitive injury.

III. The Respondents Cannot Evade the Erroneous Statutory Construction of the "Different Routes" Provision

In its analysis of the Petitioners' discrimination claims, the starting point of the ICC's analysis was its determination that relief was precluded by 49 U.S.C. § 10741(f)(4), which provides that the statutory proscription against discrimination "shall not apply to . . . rail rates applicable to different routes." Pet. C23-24. Again, Respondents miscast Petitioners argument for review, characterizing it as a dispute about the ICC's "factual conclusions regarding the sites at which petitioners received their potatoes." RB 9.

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[4] The ICC did not reject or otherwise disturb this factual determination by its ALJ. Rather, after reciting Conrail's arguments, the Commission merely concluded "it is not clear that petitioners' Idaho business suffered as much as petitioners claim." Pet. C25.

In reality, the Petitioners have demonstrated that the ICC and the Court of Appeals have misinterpreted section 10741(f)(4). First, the "different routes" provision has no application to the form of discriminatory treatment practiced by Conrail, which surcharges the Petitioners regardless of the route or destination of their shipments.[5] Second, the legislative history makes clear that the endpoints which define railway "routes," within the meaning of the statute, encompass much broader geographic regions than the Court of Appeals and the ICC were willing to recognize. Pet. 24 n.8. The question is one of statutory construction -- not factual evaluation.

By sanctioning the ICC's unwarranted expansion of the section 10741(f)(4) exemption, the Second Circuit has significantly limited the scope of the discrimination that is prohibited by the Interstate Commerce Act. Straining to limit this Court's consideration, Respondents argue that "the 'different routes' analysis is not essential to the outcome of this case." RB 9. Respondents' are mistaken in two respects. First, since the ICC began its rate discrimination analysis with its detailed discussion of the "different routes" provision, Pet. C22-24, the Respondents are wrong in arguing that the ICC's "finding of no discrimination ultimately rested on its conclusion that petitioners suffered no decline in business, and no competitive injury, from the surcharge," RB 9. Second, apart from how the Petitioners' discrimination claims are ultimately resolved, the Second Circuit's opinion

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[5] The Court of Appeals failed even to address this argument of the Petitioners, which was fully briefed below.

nonetheless stands as precedent for an unduly limited definition of the rate discrimination prohibited under federal law. The extreme importance of a proper definition in this area is highlighted by Congress's statutory pronouncement that "it is the policy of the United States Government . . . to prohibit unlawful discrimination." 49 U.S.C. § 10101a(13).

IV. The Respondents Have Misidentified the Matters in Dispute

The Respondents strain to present this case as a narrow dispute over a fact-bound administrative record. To that end, Respondents contend that "Petitioners do not challenge the court's conclusion that they failed to identify their competitors, nor do they explain why the requirement that they identify their competitors is unreasonable in light of their claim that their business suffered competitive injury." RB 8. Contrary to Respondents suggestion, these matters are most definitely disputed by the Petitioners.

As the Petitioners pointed out to the Court of Appeals, they did identify their competitors in the course of the administrative proceeding through their responses to interrogatories. Pet. B18.[6] In addition, the ICC Administrative Law Judge found ample evidence in the record -- including references made by Conrail itself --

[6] Neither the ICC nor the Court of Appeals cited any authority for the proposition that Petitioners' responses were inadequate.

identifying competing receivers in the New York City area.[7] Having clearly identified their competitors, the Petitioners' proof quite rationally focused on figures and statistics relating to the operations and profitability of their own businesses. Even if the proprietary information belonging to their competitors were somehow available to the Petitioners, the Court of Appeals did not explain how such data would be relevant (much less essential) to Petitioners' proof that their business declined as a result of the surcharge.

Furthermore, the Petitioners have quite clearly explained why the identification of their competitors was a red herring with respect to this particular discrimination claim. In the typical case of rate discrimination, the railroad targets a selected customer for unfavorable treatment over a selected rail route; the discrimination becomes apparent only by comparing the rate charged to

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[7] The Administrative Law Judge concluded as follows:

> Petitioners do not specifically identify all of the New York City area receivers who are advantaged in relation to . . . the action of Conrail in imposing a damage claim penalty on Petitioners. However, there is no doubt such receivers exist. Some are identified by witness Koerpel of the Southern Pacific Railroad. Conrail itself refers to other potato receivers in the city of New York.

Pet. D100.

the targeted receiver against the rates charged to its competitors for similar traffic. In this case, however, Conrail was so bold as to target the Petitioners with an additional fee -- a separate surcharge over and above its generally available rates -- for their potato traffic to any destination that the railroad services. Competitors' traffic is irrelevant since it is undisputed that only the Petitioners are the subject to the additional surcharge. In short, this egregious add-on charge represents rate discrimination in its purest form.

CONCLUSION

For the forgoing reasons, as well as those previously stated, Petitioners respectfully request that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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